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THE EXECUTION OF SEALED INSTRUMENTS BY AN AGENT*

§ 1. PURPOSE OF THIS ARTICLE.—The manner of the execution of instruments under seal, such as deeds, bonds and other solemn writings, is of so much importance and has been so frequently discussed, as to merit the more extended treatment, which it is the purpose of this article to devote to it. The word "deed" herein is used to describe all instruments under seal, and not merely conveyances of land.

It is to be observed that the question here is not how authority to execute sealed instruments is to be conferred, but how such an authority is to be executed.

§ 2. MUST PURPORT TO BE MADE AND SEALED IN THE NAME OF THE PRINCIPAL.—It is a fundamental rule in the law of agency that in order to bind the principal by a deed executed by an agent, the deed must upon its face purport to be made, signed and sealed in the name of the principal. If, on the contrary, though the agent describes himself as "agent," or though he add the word "agent" to his name, the words of grant, covenant and the like, purport upon the face of the instrument to be his, and the seal purports to be his seal, the deed will bind the agent if any one and not the principal.¹

So, in order to enable the principal to enforce the obligation against the other party, the same rule must be observed. For it is well settled by the strict rules of the common law, that no person can sue or be sued upon an instrument necessarily under seal unless he be named therein as a party to the same.²

The rules, moreover, hereafter to be considered, which enable an undisclosed principal to sue or be sued upon a contract made by his

*Adapted from material collected for the forthcoming new edition of the writer's treatise on Agency.

¹ *Stinchfield v. Little*, 1 *Greenl.* (Me.) 231, 10 *Am. Dec.* 65; *Stone v. Wood*, 7 *Cow. (N. Y.)* 452, 17 *Am. Dec.* 529; *Lutz v. Linthicum*, 8 *Pet. (U. S.)* 165; *Fullam v. West Brookfield*, 9 *Allen (Mass.)* 1; *Townsend v. Corning*, 23 *Wend. (N. Y.)* 435; *Briggs v. Partridge*, 64 *N. Y.* 357, 21 *Am. Rep.* 617; *Grubbs v. Wiley*, 17 *Miss.* 29; *Hopkins v. Mehaffy*, 11 *S. & R. (Penn.)* 126; *Webster v. Brown*, 2 *Rich. (S. C.) N. S.* 428; *Echols v. Cheney*, 28 *Cal.* 157; *Morrison v. Bowman*, 29 *Cal.* 337; *City of Providence v. Miller*, 11 *R. I.* 272; *Elwell v. Shaw*, 16 *Mass.* 42, 8 *Am. Dec.* 126; *Brinley v. Mann*, 2 *Cush. (Mass.)*, 337, 48 *Am. Dec.* 669; *Combe's Case*, 9 *Co. 76*; *Fowler v. Shearer*, 7 *Mass.* 14; *Carter v. Chaudron*, 21 *Ala.* 72; *Bogart v. De Bussy*, 6 *Johns. (N. Y.)* 94; *Martin v. Flowers*, 8 *Leigh (Va.)* 158, and see cases cited in following sections.

² *Buffalo Catholic Institute v. Bitter*, 87 *N. Y.* 250; *McColgan v. Katz*, 29 *N. Y. Misc.* 136, 60 *N. Y. Supp.* 291; *Loeb v. Barris*, 50 *N. J. L.* 382, 13 *Atl.* 602; *Harms v. McCormick*, 132 *Ill.* 104, 22 *N. E.* 511. See also *Potter v. Bassett*, 35 *Mo. App.* 417.

agent, have, as will be seen, no application to instruments under seal.³

The general rule, however, while well settled, is highly technical in its nature, being founded upon the common law theories of the effect of a seal, and like other rules based purely upon these theories, has encountered a strong tendency in recent cases to make the mere presence of a seal subordinate to the evident intention of the parties.⁴

§ 3.—RULE DIFFERENT IN TEXAS.—A different rule seems to prevail in Texas. There, it is held not to be essential that the agent shall refer to his power, and he may make the deed in his own name.⁵ “If the grantor has no estate in the land which can pass by the deed, but has a power to convey the title of another, his act will be referred to his power because the purchaser will be supposed to have bought in reliance on it.” So it is held, that if the attorney refers to one power which is invalid, but he has another valid power not referred to, he will be presumed to have acted under the latter.⁶ Whether when he acts without reference to his power he is to be deemed to be acting in pursuance of it or independently of it, and on his own account, seems to be a question of fact to be determined in view of all the circumstances of the case.⁷

§ 4.—RULE CHANGED BY STATUTE IN A FEW STATES.—In a few of the States, the general rule has been changed by statutes, which in substance provide that the fact that the attorney is named as the grantor or that he signs instead of the principal shall not prevent the taking effect of the deed as the deed of the principal where that appears to have been the intention of the parties.⁸

³ *Lenney v. Finley*, 118 Ga. 718, 45 S. E. 593; *Badger Silver Mining Co. v. Drake*, 88 Fed. 48; *Farrar v. Lee*, 10 App. Div. 130, 41 N. Y. Supp. 672; *Benham v. Emery*, 46 Hun 156; *Equitable Life Assur. Soc. v. Smith*, 25 Ill. App. 471.

⁴ See remarks of HENRY, J., in *McClure v. Herring*, 70 Mo. 18, 35 Am. Rep. 404.

⁵ Thus in *Trinity County Lumber Co. v. Pinckard*, 4 Tex. Civ. App. 671, 23 S. W. 720, 1015, it is said, “The execution of a power by the attorney in his own name is at common law invalid; but that rule does not now, nor did it obtain in this state when the act in question was passed. Under the law of this state a power may be executed by the attorney without reference to his authority. Our law, in this particular at least, dispenses with the technical requirements of the common law; and if the attorney has the power to convey, the conveyance is binding upon the principal, and conveys his title, though the conveyance be made without reference to him. *Hough v. Hill*, 47 Tex. 148; *Rogers v. Bracken*, 15 Tex. 564; *Link v. Page*, 72 Tex. 592.” See also, *Hill v. Conrad*, 91 Tex. 341, 43 S. W. 789; *Pool v. Foster's Heirs* (Tex. Civ. App.), 49 S. W. 923; *Rye v. Petroleum Co.* (Tex. Civ. App.), 95 S. W. 622.

⁶ *Hough v. Hill*, *supra*; *Link v. Page*, *supra*.

⁷ Thus in *Hill v. Conrad*, *supra*, where the agent in making the conveyance declared himself to be the owner and referred to a conveyance to himself, it was held that his deed could not be sustained as an execution of the power.

⁸ MAINE [1883], p. 605, § 15.—Deeds and contracts, executed by an authorized agent of a person or a corporation in the name of his principal, or in his own name for his principal, are in law the deeds and contracts of such principal.

§ 5. ——EFFECT OF STATUTES ABOLISHING SEALS OR MAKING THEM UNNECESSARY.—In several of the States, moreover, the rules affecting sealed instruments generally have been more or less modified by statute. Thus in Minnesota where the statute provides that “the use of private seals on written contracts is hereby abolished, and the addition of a private seal to an instrument in writing shall not affect its character in any respect,” it was held that all the differences theretofore existing in the law between sealed and unsealed instruments were abolished and that notwithstanding the presence of a seal, an undisclosed principal could be charged upon parol evidence of his existence.⁹

On the other hand, in Texas, where the statute declares that no private seal shall be necessary to the validity of any contract, bond or conveyance, “nor shall the addition or omission of a seal or scroll in any way affect the force and effect of the same,” it was held that this statute had not changed the rule.¹⁰

OHIO (R. S. § 4110).—No deed of real estate executed by any person acting for another, under a power of attorney duly executed, acknowledged and recorded, shall be held to be invalid or defective because he is named therein, as such attorney, as the grantor instead of his principal; nor because his name, as such attorney, is subscribed thereto, instead of the name of the principal; nor because the certificate of acknowledgment, instead of setting forth that the deed was acknowledged by the principal, by his attorney, sets forth that it was acknowledged by the person who executed it, as such attorney; but all such deeds so executed shall be as valid and effectual, in all respects, within the authority conferred by such powers of attorney, as if they had been executed by the principals of such attorneys, in their own proper persons.

PENNSYLVANIA (Purdon's Digest of Stat., 13th ed., p. 376, § 8).—Whenever any deed of conveyance or other instrument of writing has been heretofore executed or acknowledged, or both under any power sufficiently authorizing the same, which power shall have been recited in said deed or other instrument, shall have been informally executed by an attorney, in his own name, reciting his authority, instead of being executed in the name of the principal or principals, such deed or instrument shall be taken to be of the same validity and effect as if executed in the name and behalf of the principal or principals, as a party or parties thereto.

TENNESSEE (Shan. Code, § 3679).—Instruments in relation to real or personal property, executed by an agent or attorney, may be signed, by such agent or attorney for his principal, or by writing the name of the principal by him as agent or attorney, or by simply writing his own name or his principal's name, if the instrument on its face shows the character in which it is intended to be executed.

See *McCreary v. McCorkle* (Tenn. Ch.), 54 S. W. 53.

VIRGINIA (Code, § 2416).—If, in a deed made by one as attorney in fact for another, the words of conveyance or the signature be in the name of the attorney, it shall be as much the principal's deed as if the words of conveyance or the signature were in the name of the principal by the attorney, if it be manifest on the face of the deed that it should be construed to be that of the principal to give effect to its intent.

WEST VIRGINIA (Ch. 71, § 3).—If in a deed made by one as attorney in fact for another, the words of conveyance or the signature be in the name of the attorney, it shall be as much the principal's deed as if the words of conveyance or the signature were in the name of the principal by the attorney, if it be manifest on the face of the deed that it should be construed to be that of the principal to give effect to its intent.

⁹ *Streeter v. Janu*, 90 Minn. 393, 96 N. W. 1128. To same effect is *Gibbs v. Dickson*, 33 Ark. 107.

¹⁰ *Sanger v. Warren*, 91 Tex. 472, 44 S. W. 477. See also, *Jones v. Morris*, 61 Ala. 524.

§ 6. ——HOW WHERE INSTRUMENT VALID WITHOUT A SEAL.—Whether the rule excluding parol evidence to charge the real principal should apply where the contract though happening to be under seal, was not one to whose validity a seal was essential, is a question upon which the authorities are not entirely uniform. It is held in some cases that the evidence is as admissible under such circumstances as though no seal were in fact attached;¹¹ but in other cases it is held that the rule of exclusion applies unless the interest of the principal appears upon the face of the contract or unless the principal has ratified it and accepted the benefits of it.¹²

§ 7. INSTRUMENT MAY BIND NEITHER PRINCIPAL NOR AGENT.—It does not necessarily follow, of course, that either the principal or the agent must always be bound upon the instrument. It may be so executed that neither will be bound. Thus, if the covenants are clearly the covenants of the principal, but the agent signs in his own name, and appends his own seal, neither the principal nor the agent will ordinarily be liable upon the instrument: the principal, because he has not signed, and the agent, because he has not covenanted.¹³ For similar reasons, the reverse of the situation will be subject to the same rule, that is, where the grants and covenants are clearly those of the agent only, but the signature and seal are those of the principal.¹⁴ In general, as will be seen hereafter, the agent cannot be liable upon the instrument itself unless it contains apt words to bind him personally; though in many cases, as will be seen, he will be liable upon an express or implied warranty of authority.

Courts have, however, in several cases declared that, *ut res magis valeat, quam pereat*, they would, where the principal could not be held, lean towards a construction which would make the agent personally liable.¹⁵

§ 8. ——OR BE SIMPLY INOPERATIVE AS CONVEYANCE—AGENT'S LIABILITY ON COVENANTS—ESTOPPEL.—The instrument may also in many cases be simply inoperative, as a conveyance. Thus, where the agent undertakes in his own name to convey or lease that which clearly belongs to his principal, the conveyance or lease will be of no

¹¹ *Stowell v. Eldred*, 39 Wis. 614; *Kirschbon v. Bonzel*, 67 Wis. 178, 29 N. W. 907; *Lancaster v. Knickerbocker Ice Co.*, 153 Pa. 427, 26 Atl. 251.

¹² *Smith v. Pierce*, 45 App. Div. 628, 60 N. Y. Supp. 1011; *Schaeffer v. Henkel*, 75 N. Y. 378; *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. Rep. 617; *Simpson v. New York, etc., R. Co.*, 51 N. Y. Supr. 419. Compare *Rand v. Moulton*, 72 N. Y. App. Liv. 236, 76 N. Y. Supp. 174.

¹³ *Whitford v. Laidler*, 94 N. Y. 145, 46 Am. Rep. 131; *Bellas v. Hays*, 5 Serg. & R. (Pa.) 427; *Hopkins v. Mehaffy*, 11 S. & R. (Pa.) 126; *Neufeld v. Beidler*, 37 Ill. App. 34; *Abbey v. Chase*, 6 Cush. (Mass.) 54; *Ellis v. Pulsifer*, 4 Allen (Mass.) 165; *Townsend v. Corning*, 23 Wend. (N. Y.) 435; *Morrison v. Bowman*, 29 Cal. 337.

¹⁴ *Steele v. McElroy*, 1 Sneed (Tenn.) 341. But compare cases cited in § 13, *post*.

¹⁵ See *Hall v. Cockrell*, 28 Ala. 507.

effect as such and will not support the agreement of the other party to pay the purchase price or rent therein provided for.¹⁶ Where, however, the covenant though made by the agent, is that the principal will convey, such a covenant is valid and furnishes a good consideration for the agreement of the opposite party to pay.¹⁷

But though the instrument may be invalid as a conveyance, the agent may be liable upon any of the covenants contained in it, which may subsist without a transfer of the title.¹⁸

The agent's personal covenant in such a case may, it is held, operate by way of estoppel to prevent the agent's setting up a subsequently acquired title to the same premises,¹⁹ but he is not estopped by covenants made in the principal's name.²⁰

§ 9. How QUESTION DETERMINED.—In determining whether the deed is the deed of the principal, regard may be had, *First*, to the party named as grantor. Is the deed stated to be made by the principal or by some other person? *Secondly*, to the granting clause. Is the principal or the agent the person who purports to make the grant? *Thirdly*, to the covenants, if any. Are these the covenants of the principal? *Fourthly*, to the testimonium clause. Who is it who is to set his name and seal in testimony of the grant? Is it the principal or the agent? And *Fifthly*, to the signature and seal. Whose signature and seal are these? Are they those of the principal or of the agent?

If upon such an analysis the deed does not upon its face purport to be the deed of the principal, made, signed, sealed and delivered in his name and as his deed, it cannot take effect as such.

§ 10. SAME SUBJECT—NOT ENOUGH THAT THE AGENT IS DESCRIBED AS SUCH.—It is not enough that the agent was in fact authorized to make the deed, if he has not acted in the name of the principal. Nor is it sufficient that he describes himself in the deed as acting by virtue of a power of attorney or otherwise, for, or in behalf of, or as attorney, of the principal, or as a committee, or as

¹⁶ *First Baptist Church v. Harper*, 191 Mass. 196, 77 N. E. 778; *Murray v. Armstrong*, 11 Mo. 209; *Potter v. Bassett*, 35 Mo. App. 417; *Bogart v. De Bussy*, 6 Johns. (N. Y.) 94; *Frontin v. Small*, 2 Ld. Ray. 1418; *Jones v. Morris*, 61 Ala. 518; *Fisher v. Salmon*, 1 Cal. 413, 54 Am. Dec. 297; *Echols v. Cheney*, 28 Cal. 157; *Casey v. Lucas*, 2 Bush (Ky.) 57; *Fowler v. Shearer*, 7 Mass. 18; *Elwell v. Shaw*, 16 Mass. 42, 8 Am. Dec. 126; *Holmes v. Carman*, 1 Freem. Ch. (Miss.) 408; *Locke v. Alexander*, 2 Hawks (N. C.) 155, 11 Am. Dec. 750.

¹⁷ *Spencer v. Field*, 10 Wend. (N. Y.) 88, distinguishing *Bogart v. De Bussy*, *supra*, and *Frontin v. Small*, *supra*.

¹⁸ *Lutz v. Linthicum*, 33 U. S. (8 Pet.) 165; *Mitchell v. Hazen*, 4 Conn. 495, 10 Am. Dec. 169; *Sumner v. Williams*, 8 Mass. 162. But see *Locke v. Alexander*, 2 Hawks (N. C.) 155, 11 Amer. Dec. 750.

¹⁹ *North v. Henneberry*, 44 Wis. 306; *Heard v. Hall*, 16 Pick. (Mass.) 457.

²⁰ *Kern v. Chalfant*, 7 Minn. 487; *Smith v. Penny*, 44 Cal. 161.

trustee of a corporation, etc.; for these expressions are but *descriptio personæ*, and if in fact he has acted in his own name and set his own hand and seal, the causes of action thereon accrue to and against him personally and not to or against the principal, despite these recitals.²¹

But at the same time, no set form of words is necessary. The deed must be in the name, and purport to be the act and deed, of the principal; but whether such is the purport of the instrument, must be determined from its general tenor, and not from any particular clause. Such construction must be given, in this as well as in other questions arising on conveyances, as shall make every part of the instrument operative as far as possible; and when the intention of the parties can be discovered, such intention should be carried into effect, if it can be done consistently with the rules of law.²²

Thus in a leading English case, it is said by GROSE, J.: "There is no particular form of words required to be used, provided the act be in the name of the principal, for where is the difference between signing J. B. by M. W., his attorney, which must be admitted to be good, and M. W. for J. B? In either case, the act of sealing and delivering is done in the name of the principal and by his authority. Whether the attorney put his name first or last cannot affect the validity of the act done."²³ The particular illustration used here, however, is not a very happy one; because, as will be seen,²⁴ the form "M. W. for J. B." is not always free from difficulty.

²¹ *Stinchfield v. Little*, 1 Greenl. (Me.) 231, 10 Am. Dec. 65; *Fowler v. Shearer*, 7 Mass. 14; *Tippets v. Walker*, 4 Mass. 595; *Tucker v. Bass*, 5 Mass. 164; *Taft v. Brewster*, 9 Johns. (N. Y.) 334, 6 Am. Dec. 280; *Lutz v. Linthicum*, 8 Pet. (U. S.) 165; *Fullam v. West Brookfield*, 9 Allen (Mass.) 1; *Duval v. Craig*, 2 Wheat. (U. S.) 45; *Deming v. Bullitt*, 1 Blackf. (Ind.) 241; *White v. Skinner*, 13 Johns. (N. Y.) 307, 7 Am. Dec. 381; *Quigley v. DeHaas*, 82 Penn. St. 267; *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. Rep. 617; *Henricus v. Englert*, 137 N. Y. 488, 33 N. E. 550; *Kiersted v. Orange*, etc., R. R. Co., 69 N. Y. 343, 25 Am. Rep. 199; *Sargent v. Webster*, 13 Metc. (Mass.) 497, 46 Am. Dec. 743; *Endsley v. Strock*, 50 Mo. 508; *Jones v. Morris*, 61 Ala. 518; *Banks v. Sharp*, 6 J. J. Marsh (Ky.) 180; *Locke v. Alexander*, 2 Hawk. (N. C.) 155, 11 Am. Dec. 750; *Scott v. McAlpin*, N. C. Term Rep. 155, 7 Am. Dec. 703; *Bellas v. Hays*, 5 Serg. & R. (Penn.) 427, 9 Am. Dec. 385; *Fisher v. Salmon*, 1 Cal. 413, 54 Am. Dec. 297; *Welsh v. Usher*, 2 Hill Ch. (S. C.) 167, 29 Am. Dec. 63; *Buffalo Catholic Institute v. Bitter*, 87 N. Y. 250; *Willis v. Bellamy*, 52 N. Y. Super. Ct. 373; *Sheridan v. Pease*, 93 Ill. App. 219; *Home Library Ass'n v. Witherow*, 50 Ill. App. 117; *Jackson v. Roberts*, 95 Ky. 410, 25 S. W. 879; *De Bebian v. Gola*, 64 Md. 262, 21 Atl. 275.

²² *Hale v. Woods*, 10 N. H. 470, 34 Am. Dec. 176; *Jackson v. Blodget*, 16 Johns. (N. Y.) 172; *Bridge v. Wellington*, 1 Mass. 219; *Davis v. Hayden*, 9 Mass. 514; *Hatch v. Dwight*, 17 Mass. 289, 9 Am. Dec. 147; *Magill v. Hinsdale*, 6 Conn. 464 a, 16 Am. Dec. 70; *Hovey v. Magill*, 2 Conn. 680.

²³ *Wilks v. Back*, 2 East 142. See the criticism on this language of GROSE, J., by David Hoffman, Esq., in 3 Am. Jur., at p. 82, et seq.

²⁴ See *Dolan v. Alley*, 153 Mass. 380, 26 N. E. 989; *King v. Handy*, 2 Ill. App. 212; *Offutt v. Ayers*, 7 T. B. Mon. (Ky.) 356; *Dawson v. Cotton*, 26 Ala. 591.

§ 11. SAME SUBJECT—ILLUSTRATIONS.—Thus where a deed was executed by an agent in the following form, “Know all men, etc., that I, Josiah Little, of, etc., by virtue of a vote of the Pejebscot Proprietors, passed, etc., authorizing and appointing me to give and execute deeds for and in behalf of said proprietors, for and in consideration of the sum of thirty-seven pounds to me in hand paid by Thomas Stinchfield, of, etc., the receipt whereof I do hereby acknowledge, have given, granted, released, conveyed and confirmed unto him, the said Thomas Stinchfield, his heirs and assigns, two hundred acres, etc. To have and to hold, etc., hereby covenanting in behalf of said proprietors, their respective heirs, executors and administrators, to and with the said T. S., his heirs and assigns, to warrant, confirm and defend him and them in the possession of the said granted premises, against the lawful claims of all persons whatsoever. In testimony that this instrument shall be forever hereafter acknowledged by the said proprietors as their act and deed and be held good and valid by them, I, the said Josiah Little, by virtue of the aforesaid vote, do hereby set my hand and seal this day, etc.” Signed “Josiah Little, Seal,” it was held to be the deed of Josiah Little and that he, and not the Pejebscot Proprietors, was liable upon the covenants.²⁵

So where Jonathan Elwell executed to Joshua Elwell a power of attorney to convey the lands in question, and the latter, purporting to act in pursuance of it, executed a deed of the land, in which, after reciting the power, he proceeded: “Now know ye that I, the said Joshua, by virtue of the power aforesaid, in consideration, etc., do hereby bargain, grant, sell and convey unto the said (grantees) to have and to hold, etc., and I do covenant with the said (grantees) that I am duly empowered to make the grant and conveyance aforesaid; that the said Jonathan at the time of executing said power was, and now is, lawfully seized of the premises, and that he will warrant and defend the same, etc. In testimony whereof, I have hereunto set the name and seal of the said Jonathan this day, etc.” and signed “Joshua Elwell” and seal, the deed was held not to be the deed of Jonathan.²⁶

§ 12. And again where one of two deeds which purported to be made by “New England Silk Company, a corporation, by Christopher Colt, Jun., their treasurer,” was attested: “In witness whereof, I, the said Christopher Colt, Jun., in behalf of said company, and as their treasurer, have hereunto set my hand and seal,” was signed and sealed “Christopher Colt, Jun., treasurer, New England Silk Com-

²⁵ *Stinchfield v. Little* (1821), 1 Greenl. (Me.) 231, 10 Am. Dec. 65.

²⁶ *Elwell v. Shaw* (1819), 16 Mass. 42, 8 Am. Dec. 126.

pany," and the acknowledgment was to the effect that "Christopher Colt, Jun., treasurer, etc., acknowledged the above instrument to be his free act and deed," and the other deed was like the first except that Colt was therein described as "treasurer of New England Silk Company, and duly authorized for that purpose," the court held each of them to be inoperative to convey the title of the Silk Company. In both of these deeds, as will be noticed, the principal was properly named as grantor but they were signed and sealed by the agent in his own name. "Both of these deeds," said Judge METCALF, "were executed by C. Colt, Jun., in his own name, were sealed with his seal, and were acknowledged by him as his acts and deeds. In one of them, it is true, he declared that he acted in behalf of the company, and as their treasurer; and in the other he declared himself to be their treasurer, and to be duly authorized for the purpose of executing it. But this was not enough. He should have executed the deeds in the name of the company. He should also have affixed to them the seal of the company, and have acknowledged them to be the deeds of the company."²⁷

§ 13. Where, however, although the agent was named in the instrument as the party, the deed was properly signed in the name of the principal, it was given effect as the deed of the principal, and not of the agent.²⁸ In this case a lease was made commencing as follows: "This indenture, made this 17th day of April, A. D. 1869, between Daniel R. Brant, of the city of Chicago, party of the first part, and Edward F. Lawrence, president of the Northwestern Distilling Company, of the same place, party of the second part." Throughout the lease the parties were spoken of as persons and the covenants were personal covenants, and the instrument concluded as follows: "In testimony whereof, the said parties have hereunto set their

²⁷ *Brinley v. Mann* (1848), 2 *Cush.* (Mass.) 337, 48 *Am. Dec.* 669. Compare *Haven v. Adams*, 4 *Allen* (Mass.) 80.

Where a deed was in form the deed of Stephen Smith [the principal] from the beginning to the end of the *testimonium* clause, but was signed "Stephen Henry Smith, attorney in fact of Stephen Smith," it was held not to be the deed of Stephen Smith; *Morrison v. Bowman*, 29 *Cal.* 337.

²⁸ *Northwestern Distilling Co. v. Brant* (1873), 69 *Ill.* 658, 18 *Am. Rep.* 631. See also to the same effect *Shanks v. Lancaster* (1848), 5 *Gratt.* (Va.) 110, 50 *Am. Dec.* 108; *Butterfield v. Beall* (1851), 3 *Ind.* 203. Compare *Hancock v. Younker*, 83 *Ill.* 208.

But where an agreement for the building of lodge rooms ran between "G. M. S. on the one part and S. M. M., D. S. H., A. R. D., committee for Union Chapter No. 18, and W. S. S., S. L. G., N. K., committee for Jackson Lodge No. 68," and "the before named committee on behalf of said Chapter and Lodge obligate themselves to pay," and was signed "G. M. S. [L. S.]; Union Chapter No. 18 [L. S.], by S. M. M., D. S. H., A. R. D., committee; Jackson Lodge No. 68 [L. S.], by W. S. S., L. S. G., N. K., committee," it was held that the agreement was between G. M. S. and the members of the committees personally, and that the latter might therefore sue for its breach: *Steele v. McElroy & Sneed* (Tenn.) 341.

hands and seals the day and year first above written. D. R. Brant. [Seal.] Northwestern Distilling Co. [Seal.] By Edward Lawrence, President."

So, where a deed reading "Know all men by these presents that the West Kansas Land Company, by Solomon Houck, President, and Theodore S. Case, Secretary, * * * has granted," etc., was signed "Solomon Houck, President [Seal], Theodore S. Case, Sect'y [Seal], W. K. Land Co. [Seal]," it was held to be the deed of the company.²⁹

§ 14. SAME SUBJECT—FURTHER ILLUSTRATIONS.—So where a manufacturing company by vote had authorized one Arthur W. Magill to make a deed of the real estate of the company, and he, in pursuance of the authority, executed a deed, of which the granting part was as follows: "Arthur W. Magill, agent for the Middletown Manufacturing Company, being empowered by vote," etc., "for and in behalf of said company," etc., "do give, grant," etc., the covenant being: "I do hereby covenant for and in behalf of said company," etc. "that said Middletown Manufacturing Company is well seized," etc., "and I do also bind the said Middletown Manufacturing Company to warrant and defend," etc., and the conclusion being as follows: "In witness whereof, I have hereto, for and in behalf of said Middletown Manufacturing Company, set my hand and seal at Middletown, this 29th day of March, A. D. 1817. Arthur W. Magill [L. s.], agent for the Middletown Manufacturing Company," it was held that this was the deed of the company and not of the agent.³⁰

And again, where the terms of the conveyance were: "I, Daniel King, as well for myself as attorney for Zachariah King, do for myself and the said Zachariah, remise, release and forever quit-claim" the premises, "together with all the estate, right, title, interest, use, property, claim and demand whatsoever, of me, the said Daniel, and said Zachariah, which we now have, or heretofore had at any time, in said premises. And we, the said Daniel and Zachariah, do hereby, for ourselves, our heirs and executors, covenant that the premises are free of all incumbrance and that the grantee may quietly enjoy the same without any claim or hindrance from us or any one claiming under us, or either of us. In witness whereof, we the said Daniel for himself and as attorney aforesaid, have hereunto set our hands and seals," etc., and signed "Daniel King" and "Daniel King, attorney for Zachariah King, being duly authorized as appears of record," with seals affixed to each signature, it was held that the grant conveyed the title of both.³¹

²⁹ *City of Kansas v. Hannibal, etc.*, R. R. Co. (1882), 77 Mo. 180.

³⁰ *Magill v. Hinsdale* (1827), 6 Conn. 464 a, 16 Am. Dec. 70.

³¹ *Hale v. Woods* (1839), 10 N. H. 470, 34 Am. Dec. 176; citing *Wilks v. Back* (1802), 2 East 142, and *Montgomery v. Dorion* (1835), 7 N. H. 484.

§ 15. So where the deed of the land of T. and S., his wife, was drawn as follows: "I., H., for myself, and as attorney for T. and S., by their letters of attorney under their hands and seals, in consideration, etc., to us paid by L., do sell and convey to L., etc. And we the said T. and S. do covenant, etc. In witness whereof, I., H., in my own right have hereunto set my hand and seal, and as attorney for said T. and S. have hereunto set their hands and seals," and was signed "H. [L. S.] T. [L. S.] S. [L. S.]. By H., their attorney in fact," it was held that the deed was that of T. and his wife S., and not of the agent H.³²

But where A. gave to his wife B. a power of attorney to execute a deed of land and she made the deed in the following form: "Know ye that I, B., of, etc., as attorney to A., of, etc., in consideration, etc., have granted, etc. In witness whereof I have hereunto set my hand and seal. B. [Seal]," the court held that it was not the deed of A.³³

§ 16. SAME SUBJECT—FURTHER ILLUSTRATIONS—DESCRIPTIO PERSONAE.—Where the covenants are clearly personal, the mere addition of the word "agent," "trustee," etc., will not, as has been stated, change their character.

Thus where a bond was executed by certain persons, who signed and sealed the same as individuals, but added "Trustees of the Baptist Society of the Town of Richfield," the court said: "The bond must be considered as given by the defendants in their individual capacities. It is not the bond of the Baptist church; and if the defendants are not bound the church certainly is not, for the church has not contracted either in its corporate name or by its seal. The addition of 'Trustees' to the names of the defendants is, in this case, a mere *descriptio personarum.*"³⁴

And for the same reason, where A., B., C. and others, "trustees of the Methodist Episcopal Church of Jacksonville, their successors and assigns," executed a bond, binding themselves, their heirs, executors and administrators, and signed it in their individual names, they were held personally liable.³⁵

§ 17. So, where a contract to convey recited that it was made between W. of the first part and F., president of the second part, and was signed and sealed "F., Pres. of Buffalo Catholic Inst." it was held, that the contract was that of F. and not of the corpor-

³² McClure *v.* Herring (1879), 70 Mo. 18, 35 Am. Rep. 404. To like effect see Shanks *v.* Lancaster (1848), 5 Gratt. (Va.) 110, 50 Am. Dec. 108.

³³ Fowler *v.* Shearer (1810), 7 Mass. 15.

³⁴ Taft *v.* Brewster (1812), 9 Johns. (N. Y.) 334, 6 Am. Dec. 280. See Fullam *v.* West Brookfield (1864), 9 Allen (Mass.) 1.

³⁵ Dayton *v.* Warne (1881), 43 N. J. L. 659.

ation; and that the corporation could not sue on the instrument in its own name.³⁶

So, where a lease under seal describes the lessor as "H. B., agent of M. L.," and it is signed "H. B., agent," with his seal, the words "he" and "his" being used in all the terms and covenants, naming the party of the first part, a declaration in the name of M. L. is bad, on demurrer.³⁷

§ 18. SAME SUBJECT—WHAT FORM SUFFICIENT.—Where a lease purporting to be made by Mussey, was signed "John Hammond for B. B. Mussey, (Seal)" it was held that it was well executed as the lease of Mussey. Said the court: "The defendant does not deny Hammond's authority, but takes the ground that the lease is not the deed of Mussey but of Hammond. And the common learning is relied on, to wit, that when a deed is executed by attorney, it must be the act of the principal, done and executed in the principal's name. The only question is, What is an execution of a deed, by an attorney, in the name of the principal? We understand the execution of a deed to be the signing, sealing and delivery of it. These must be done in the name of the principal by the hand of the attorney. When the signing and sealing are in the name of the principal, the delivery will be presumed to have been so, unless the contrary is proved. But however clearly the body of the deed may show an intent that it shall be the act of the principal, yet unless it is executed by his attorney for him, it is not his deed, but the deed of the attorney or of no one.³⁸ The most usual and approved form of executing a deed by attorney is by his writing the name of the principal and adding 'by A. B. his attorney' or 'by his attorney A. B.' But this is not the only form of execution which will make the deed the act of the principal. In *Wilks v. Back*,³⁹ M. Wilks, attorney for J. Browne, executed a deed for himself and Browne in this form: 'Mathias Wilks' (Seal); 'For James Browne, Mathias

³⁶ Buffalo Catholic Inst. *v. Bitter*, 87 N. Y. 250.

³⁷ *Loeb v. Barris*, 50 N. J. L. 382.

William P. O'Connor, holding a power of attorney from Elizabeth McColgan, to lease any property which she owned individually, or as executrix of her husband, John McColgan, made a lease, in her behalf, as "William P. O'Connor, as agent for Est. of John McColgan, as landlord," and signed and sealed it "William P. O'Connor, agent." Held, that Elizabeth McColgan could not bring an action on the lease, as, in view of its form and of the manner of its execution, she was a stranger to it: *McColgan v. Katz*, 29 N. Y. Misc. 136, 60 N. Y. Supp. 291.

Where a lease was made "between W. G. M., for himself and as agent of E. L. S., A. R. B. and L. V. M., party of the first part," the covenants being made to and by "said party of the first part," and the lease was signed "W. G. M., Seal," it was held to be the lease of W. G. M. personally and that E. L. S., A. R. B. and L. V. M. could not sue upon it: *Harms v. McCormick*, 132 Ill. 104, 22 N. E. 511.

³⁸ *Lessee of Clarke v. Courtney* (1831), 5 Pet. (U. S.) 350.

³⁹ 2 East 142.

Wilks' (Seal). The court of King's bench decided that the deed was well executed in the name of Browne. This decision has never been overruled, but has always been regarded as rightly made."⁴⁰

§ 19. So where the operative clauses of a deed were in the name of the corporation "by William Wallace, their agent," and the covenants were in the name of the corporation, but the signature was "William Wallace, Agent for the Flower Brook Manufacturing Company," the court held that the deed must be considered the deed of the corporation.⁴¹

And where a contract under seal was made "between the C. I. Co. party of the first part by J. S. B. agent, and J. K. B. and E. C. B., parties of the second part;" the stipulations in the contract purporting to be between "the said party of the first part" and "the said parties of the second part," no names being given, and concluded, "In witness whereof the parties have hereunto affixed their hands and seals," and was signed "J. S. B. Agent (l. s.), J. K. B. (l. s.), E. C. B. (l. s.)," it was held to be the deed of the company.⁴²

§ 20. In the cases cited in the two preceding sections it will be noticed that the respective instruments purported to be made by and in the name of the principal. But where a bond beginning "I promise to pay," etc., and not mentioning any obligor's name, was signed, "Witness my hand and seal, H. S. Lucas, (Seal) for Charles Callender," the Supreme Court of North Carolina held Lucas personally responsible.⁴³ And so where a bond was signed "Thomas Dix, acting for James Dix," Chief Justice RUFFIN said it was "unquestionably the bond of Thomas and not of James. The former seals it and he speaks in it throughout, and the latter not at all."⁴⁴ But the same judge in passing upon the liability of a party to a deed says: "It is not material in what form the deed be signed, whether A. B. by C. D. or C. D. for A. B., *provided it appears in the deed*, and by the execution that it is the deed of the principal."⁴⁵

§ 21. DISTINCTION IN CASE OF PUBLIC AGENTS.—But a distinc-

⁴⁰ *Mussey v. Scott* (1851), 7 *Cush.* (Mass.) 215, 54 *Am. Dec.* 719, citing *Wilburn v. Larkin* (1832), 3 *Blackf.* (Ind.) 55; *Hunter v. Miller* (1846), 6 *B. Mon.* (Ky.) 612. And to the same effect are *Shanks' v. Lancaster* (1848), 5 *Gratt.* (Va.) 110, 50 *Am. Dec.* 108; *Tucker Mfng. Co. v. Fairbanks* (1867), 98 *Mass.* 105.

⁴¹ *McDaniels v. Flower Brook Mfng. Co.* (1850), 22 *Vt.* 274. See also *Martin v. Almond* (1857), 25 *Mo.* 313, and *Carter v. Chaudron*, 21 *Ala.* 72, where throughout the body of the deed it purported to be between the principal and the third party, but was signed "S. H. G. [Seal], attorney in fact for J. K.," it was held that the deed was well executed as the deed of J. K., the principal.

⁴² *Bradstreet v. Baker*, 14 *R. I.* 546. To same effect: *Hancock v. Younker*, 83 *Ill* 208; *Haven v. Adams*, 4 *Allen* (Mass.) 80.

⁴³ *Bryson v. Lucas* (1881), 84 *N. C.* 680, 37 *Am. Rep.* 634.

⁴⁴ *Oliver v. Dix*, 1 *Dev. and Bat. Eq.* (N. Car.) 158.

⁴⁵ *Redmond v. Coffin*, 2 *Dev. Eq.* (N. Car.) 437.

tion has been made in the case of public agents, who have entered into agreements, not negotiable, for the performance of public duties. In such a case it is to be presumed that they did not undertake personally to assume the public burdens, and although they may have entered into covenants under seal, partaking of a personal nature, yet where the obligation is known to be a public one, they can only be held personally bound, if at all, where the intent is clearly apparent so to bind them.⁴⁶ Said Chief Justice MARSHALL: "The intent of the officer to bind himself personally, must be very apparent indeed to induce such a construction of the contract;"⁴⁷ and it is said by another learned judge that, "It is much against public policy to cast the obligations that justly belong to the body politic upon this class of officials."⁴⁸

These cases, however, are not to be confounded with the cases where the agents, like the trustees and officers of private corporations and religious bodies, are not public in their nature, nor with cases of negotiable instruments, which stand upon different ground.

§ 22. WHETHER NECESSARY THAT DEED SHOULD PURPORT TO BE EXECUTED BY AN AGENT.—Whether it is necessary to the validity of the deed that it should on its face purport to be executed by an agent, or whether the agent may act in the principal's name throughout with nothing to disclose the fact of the agency, are questions which have been much discussed.

Thus in *Wood v. Goodridge* the agent had executed a mortgage by simply signing the name of his principal with nothing to show that it was signed by an agent and not by the principal in person. FLETCHER, J., was of the opinion that such a form of execution was not authorized, and said:—

Rule of Wood v. Goodridge.—"It should appear upon the face of the instruments that they were executed by the attorney, and

⁴⁶ *Hodgson v. Dexter*, 1 Cranch (U. S.) 345 (Secretary of War); *Knight v. Clark*, 48 N. J. L. 22, 57 Am. Rep. 534 (Township Trustees); *Jones v. LeTombe*, 3 Dallas (U. S.) 384 (Consul General of France); *Fox v. Drake*, 8 Cow. (N. Y.) 191 (Court House Commissioners); *Tutt v. Hobbs*, 17 Mo. 486 (School Trustees); *Miller v. Ford*, 4 Rich. L. (S. C.) 376, 55 Am. Dec. 687 (Commissioners of Roads); *Simonds v. Heard*, 23 Pick. (Mass.) 120, 34 Am. Dec. 41 (Committee of town held to be personally liable on the ground that the intent was clear to make them so); *Brown v. Austin*, 1 Mass. 208, 2 Am. Dec. 11 (Agent appointed to take depositions by committee of congress); *McClenticks v. Bryant*, 1 Mo. 598, 14 Am. Dec. 310 (Town Commissioners held personally liable because they exceeded their authority); *Belknap v. Reinhart*, 2 Wend. (N. Y.) 375, 20 Am. Dec. 621 (Captain U. S. Army); *Stinchfield v. Little*, 1 Greenl. (Me.) 231, 10 Am. Dec. 65; *Dawes v. Jackson*, 9 Mass. 490 (Superintendent of State's Prison); *Freeman v. Otis*, 9 Mass. 272, 6 Am. Dec. 66 (U. S. Collector of Customs); *Walker v. Swartwout*, 12 Johns. (N. Y.) 444, 7 Am. Dec. 334 (Quartermaster General U. S. Army); *Wallis v. Johnson School Township*, 75 Ind. 368 (Trustee of Schools).

⁴⁷ In *Hodgson v. Dexter*, 1 Cranch (U. S.) 345.

⁴⁸ *BEASLEY*, C. J., in *Knight v. Clark*, 48 N. J. L. 22, 57 Am. Rep. 534.

in virtue of the authority delegated to him for this purpose. It is not enough that an attorney in fact has authority, but it must appear by the instruments themselves which he executes, that he intends to execute this authority. The instruments should be made by the attorney expressly as such attorney; and the exercise of his delegated authority should be distinctly avowed upon the instruments themselves. Whatever may be the secret intent and purpose of the attorney, or whatever may be his oral declaration or profession at the time, he does not in fact execute the instruments as attorney, and in the exercise of his power as attorney, unless it is so expressed in the instruments. The instruments must speak for themselves. Though the attorney should intend a deed to be the deed of his principal, yet it will not be the deed of the principal, unless the instrument purports on its face to be his deed. The authority given clearly is, that the attorney shall execute the deed as attorney but in the name of the principal.⁴⁹ The decision in the case, however, was placed upon other grounds.

How of this Rule.—This rule, certainly, has much to commend it, as tending to the due and orderly execution of important instruments, and as facilitating greatly the proper preservation in the public records of the evidence of the authority and of its exercise. But at most, it was a mere *dictum* in the case, and its authority has not generally been conceded, even in its own State.⁵⁰

§ 23. SAME SUBJECT.—FURTHER OF THIS RULE.—In *Forsyth v. Day*,⁵¹ speaking of this case, RICE, J., said: “No case, I apprehend, can be found in the books which will sustain the rule so broadly laid down by the learned judge in the case of *Wood v. Goodridge*. Nor can the doctrine be sustained on principle. It is difficult to perceive any sound reason why, if one man may authorize another to act for him and bind him, he may not authorize him thus to act for and bind him in one name as well as in another. As matter of convenience in preserving testimony, it may be well that the names of all the parties who are in any way connected with a written instrument should appear upon the instruments themselves. But the fact that the name of the agent by whom the signature of the principal is affixed to an instrument, appears upon the instrument itself, neither proves nor has any tendency to prove, the authority of such agent. *That* must be established *aliunde*, whether his name appears as agent, or whether he simply places the name of his principal to the instrument to be executed.” This, however, was the case of a promissory note and not of a deed.

⁴⁹ (1850) 6 *Cush.* (Mass.) 117, 52 *Am. Dec.* 771.

⁵⁰ *Hunter v. Giddings*, 96 Mass. 41, 93 *Am. Dec.* 54.

⁵¹ (1856) 41 *Me.* 382.

Again in *Devinney v. Reynolds*,⁵² a deed commencing: "To all to whom these presents shall come, Know ye that Michael Hollmán by William McAllister, his lawful and regularly deputed attorney in fact, etc., grants," etc., concluded, "In witness whereof, the said Michael Hollman, by his attorney aforesaid, hath hereunto set his hand and seal," etc. To this were appended the name and seal of Michael Hollman. Said the court: "The execution of the deed is in proper form, and, indeed, we seldom see such instruments executed so much in accordance with approved precedents. It would be useless to add the name and seal of the attorney, for it is what it purports to be, the deed of the principal and not the attorney, and therefore does not require his name and seal, but the name and seal of the principal only."

§ 24. So in *Berkey v. Judd*,⁵³ a deed reciting that it was made by the principals by their attorney in fact, was signed and sealed in the names of the principals, followed by the words, "By their attorney in fact." The court said: "As respects the execution of a deed by an attorney in fact, although it is usual and better for him to sign the name of his principal, and to add thereto his own signature, with proper words indicating that the act is done by him as such attorney, yet it is not in all cases necessary that he should so append his own name. When the deed on its face purports to be the indenture of the principal, made by his attorney in fact, therein designated by name, it may be properly executed by such attorney by his subscribing and affixing thereto the name and seal of his principal alone.⁵⁴ In this case the deed purports on its face to be the indenture of the principals, and not that of the agent. It fully discloses that it was made for them and in their name by their attorney in fact who had full authority so to do. Its execution was properly acknowledged by him as such attorney in fact, and for and on behalf of his said principals. The neglect to sign his own name to the words 'by their attorney in fact' was a purely technical omission devoid of any legal effect whatever."

§ 25. In both of the cases last cited, however, it will be noticed that the fact that the deed was executed by an agent appeared from the face of the instruments.

In *Wilks v. Back*,⁵⁵ heretofore referred to, where the signature to

⁵² (1841) 1 Watts and Serg. (Penn.) 328.

⁵³ (1875) 22 Minn. 287. So in *Tidd v. Rines*, 26 Minn. 201, it was held, that a deed signed "A. B. (the name of the grantor), by C. D., his attorney in fact," sufficiently indicates that it was executed by an attorney in fact for and in the name of his principal, without reciting that fact in the body of the deed.

⁵⁴ Citing *Devinney v. Reynolds*, 1 Watts & Serg. (Penn.) 328; and *Forsyth v. Day*, 41 Me. 382.

⁵⁵ 2 East 142.

the instrument, which was an arbitration bond, was: "For James Browne, Mathias Wilks," (Seal), LAWRENCE, J., said: "Here the bond was executed by Wilks for and in the name of his principal; and this is distinctly shown by the manner of making the signature. Not even this was necessary to be shown; for if Wilks had sealed and delivered it in the name of Browne, that would have been enough without stating that he had so done."

Where the deed is to be signed in the presence and by the direction of the principal, mere parol authority is, as has been seen, sufficient; and in such case there need be nothing in the deed to indicate that the signature was set by an agent and not by the principal.

§ 26. SAME SUBJECT—HOW IN REASON.—While the rule of *Wood v. Goodridge* is undoubtedly well founded in convenience and propriety, yet it is difficult in reason to perceive why even in those cases where nothing whatever appears upon the face of the instrument to indicate it, it may not be shown by evidence *aliunde* that it was in fact executed by an agent. It cannot be said that this is to contradict, add to or vary the deed by parol evidence, for its legal effect remains the same, and it is none the less afterward what it purported to be before,—the deed of the principal. Neither can it be said that in one case there is, while in the other there is not, evidence of the agency. In either event the agency must be proved as a fact. It cannot be established by mere recitals of authority or by any pretence of acting in that capacity.

§ 27. PAROL EVIDENCE NOT ADMISSIBLE TO DISCHARGE AGENT.—Where the deed upon its face is the deed of the agent, parol evidence is not admissible to discharge the agent by showing that it was intended or understood to be the deed of the principal,⁵⁶ but where the deed is ambiguous, parol evidence may be resorted to, to show who was in fact the party intended to be charged.⁵⁷

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⁵⁶ *Willis v. Bellamy*, 52 N. Y. Super. Ct. 373; *Higgins v. Senior*, 8 M. & W. 834; *Beckam v. Drake*, 9 M. & W. 79; *Leadbitter v. Farrow*, 5 M. & S. 345; *Spencer v. Field*, 10 Wend. (N. Y.) 88; *Townsend v. Hubbard*, 4 Hill (N. Y.) 351; *Briggs v. Partridge*, 64 N. Y. 357, 21 Am. Rep. 617.

⁵⁷ *Shuetze v. Bailey*, 40 Mo. 69; *Smith v. Alexander*, 31 Mo. 193.